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Supreme Court, U.S.
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No. 96-167

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CITY OF CHICAGO

Petitioner,

v.

SYLVIA EVANS
AND BERTHA BALARK et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE BALARK RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are civil rights plaintiffs who secure a consent decree that forces a municipality to end its policy of delay in paying judgments divested of their prevailing party status when, after having been in effect for ten years, the consent decree is vacated pursuant to Rule 60(b) of the Federal Rules of Civil Procedure?

2. Did the Seventh Circuit err in its 1993 decision to vacate the consent decree that had been entered in this case in 1984?

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BRIEF IN OPPOSITION OF THE BALARK RESPONDENTS

The Balark respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case, reported at 81 F.3d 685 (7th Cir. 1996).

STATEMENT

This case has made five appearances before the Court of Appeals for the Seventh Circuit. The first appearance followed the granting of partial summary judgment in favor of respondents on January 28, 1981. The Court of Appeals affirmed the district court's opinion that the City's practice of paying $1,000 and under tort judgments before larger ones violated the equal protection clause. *Evans v. City of*

Chicago, 689 F.2d 1286, 1299-1300 (7th Cir. 1982) ("*Evans I*"). The district court's judgment that the City's practice also violated the due process clause was vacated as premature, although the court recognized that plaintiffs had a protectible property interest in prompt payment. *Id.* at 1296-99. The due process claims were remanded to the trial court.

On November 12, 1982, after the case was returned to the district court, Balark respondents moved for an award of interim attorney's fees. That motion resulted in an award to Balark respondents of $25,000 as partial interim fees on April 5, 1983. The award, however, was stayed until further order of court.

The parties negotiated a consent decree which was approved by the district court on May 30, 1984. The City agreed to pay all tort judgments in the order in which they were entered, and to pay all judgments promptly. The claims of damages to class members for past delay in paying judgments, as well as attorney's fees, were reserved.

On September 7, 1984, after the consent decree was entered, Balark respondents filed a motion for an award of interim attorney's fees, which, like the earlier motion for interim fees, was opposed by the petitioner, and which, like the earlier motion, remained pending throughout the litigation.

In April, 1987, after the consent decree had been in effect for three years, the City of Chicago voluntarily paid Balark respondents $60,000 in interim fees. Petitioner inaccurately characterizes this voluntary payment as "an award." Pet. 18, n. 5. The court played no role with respect to this payment of interim fees.

A trial on damages proceeded in the district court on October 14, 1987. During the trial, respondents argued that the City irrationally delayed payment of tort judgments while paying other judgments, such as contract claims,

immediately. The district court entered judgment for damages against the City on November 23, 1987, and the City appealed.

Because a new equal protection theory had been argued by respondents in the damage trial, and because the City of Chicago introduced new evidence of its rationale in treating the different categories of judgments unequally, the *Evans II* court revisited the equal protection issue. *See Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990) ("*Evans II*"). It overruled *Evans I*, but only with respect to the equal protection holding.

The case returned to the district court, where Balark respondents' motions for attorney's fees were still pending. On December 22, 1987, Balark respondents filed a supplementary memorandum in support of attorneys fees, which related back to the September 7, 1984 pending motion for fees. Respondents claimed they were prevailing parties by virtue of obtaining the consent decree. The City later moved to vacate the decree under Fed. R. Civ. P. 60(b)(5).[1] The district court denied the motion to vacate the decree, but did modify it, finding there to be nothing in *Evans II* that reverses or overrules any due process holding.

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1. Fed. R. Civ. P. 60 (b)(5) provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

As modified, the consent decree required the City to pay judgments in the order they are entered. Judgments under $1,000, however, did not need to be paid in order.

The City appealed. The district court was initially affirmed by the majority in *Evans v. City of Chicago*, 995 F.2d 1393 (7th Cir. 1993) *vacated and rev'd*, 10 F.3d 474 (7th Cir. 1993) (*en banc*). After rehearing *en banc*, a fragmented *en banc* court reversed, with the majority holding that the change in prevailing law occasioned by *Evans II* made prospective enforcement inequitable. *Evans v. City of Chicago*, 10 F.3d 474, 483 (7th Cir. 1993) (*en banc*), *cert. denied*, 114 S. Ct. 1831 (1994) (*Evans III*).

After the consent decree was vacated, Balark respondents renewed their motion for attorney's fees. The district court denied the motion, finding that

> [t]here can be no doubt that the plaintiff classes derived great benefit while the consent decree was in effect and that, to the extent the City continues to pay judgments in accordance with the procedures established by the vacated decree, judgment creditors of the City will continue to benefit indefinitely into the future. Nor is there any doubt that plaintiffs' counsel expended enormous amounts of time and energy in pursuing the claims which led to these results.
>
> However, while the matter is hardly free from doubt and will obviously be presented to the Court of Appeals for resolution, it appears to this court that the City is correct in its contention that, having ultimately lost the case, plaintiffs canot be consiered prevailing parties. *See Palmer v. City of Chicago*, 806 F.2d 1316, 1322-23 (7th Cir. 1986).

Pet. App. 15a. Respondents' appeal from this order resulted in the case below, *Balark v. City of Chicago*, 81 F.3d 685 (7th Cir. 1996). Pet. App. 1a-13a.

In the *Balark* appeal, respondents claimed that they were entitled to fees up to the time the decree was entered, under either, or both, of two approaches.

One, they were entitled to a fee award because they had obtained at least some relief on the merits which materially altered the relationship of the parties when they obtained the consent decree. Two, their litigation was the "catalyst" in causing the City to voluntarily change its practice of paying tort judgments, a change which has continued to this date,[2] and one that was not wholly gratuitous. The court below, deciding that respondents were prevailing parties due to having successfully obtained the consent decree, found no need to address the catalyst theory.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Question Presented by Petitioner Is Not Raised by the Record and Was Not Decided by the Court of Appeals

The sole Question Presented in the petition is

> "whether the entry of a consent decree that is later vacated because it was based on a mistake of law makes a civil rights plaintiff a 'prevailing party' entitled to an award of attorney's fees under Section 1988."

The Seventh Circuit did not decide that question in this proceeding, and the facts of the record will not support a determination of that question here.

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2. Petitioner concedes that "as a matter of policy, we currently adhere to most of the requirements of the consent decree," although not compelled by the law to do so. Pet. 13.

The question decided by the court was whether respondents are entitled to fees as prevailing parties for wining and maintaining a consent decree, or whether the fact they ultimately lost the decree defeats their claim. *Balark*, 81 F.3d at 660, Pet. App. 2a.

Contrary to petitioner's characterization, the consent decree here was not based on a mistake of law. The decision of the court below was that the decree, "*which was properly supported* when the district court entered the injunction in 1984," was vacated because "'this court's decision in [*Evans II*] *changed the prevailing law* to such a degree as to make further enforcement of the consent decree by the district court inappropriate under the standards set forth by the Supreme Court in *Rufo v. Inmates of the Suffolk County Jail*, [502 U.S. 367 (1992)].'" *Balark*, 81 F.3d 658 (7th Cir. 1996), (citing *Evans III*, 10 F.3d at 483). Pet. App. 5a. (emphasis added).

Petitioner repeatedly misstates the holding of a fragmented *Evans III* court. Five judges constituted the plurality in an opinion authored by Judge Easterbrook. Judge Ripple concurred on narrower grounds. Five judges dissented in two separate opinions.

The concurring opinion by Judge Ripple, thus can be viewed as constituting the holding of the court. *See Marks v. United States*, 430 U.S. 188 (1977). Contrary to petitioner's statement, (Pet. 5), Judge Ripple did not agree that *Evans II* had "repudiated" the equal protection theory. Judge Ripple's concurring opinion states:

> For the present, it is sufficient to conclude that this court's decision in (Evans II), changed the prevailing law to such a degree as to make further enforcement of the consent decree by the district court inappropriate under the standards set forth by the Supreme Court in *Rufo v. Inmates of the Suffolk County Jail*, ___U.S.___,

112 S.Ct. 748, 762-64, 116 L.Ed. 2d 867 (1992).

Evans III, 10 F.3d at 483. *Evans I* was the prevailing law; it was the legal foundation of the consent decree at the time the decree was entered, and it was the law of the Circuit from 1982 until 1989. *Evans II* "changed the prevailing law."

As the court below recognized, "Judge Easterbrook's opinion for the plurality of the *en banc* Court did not rest on the proposition that the plaintiffs' claims were frivolous, or that the consent decree had somehow never existed. To the contrary, he stated squarely that '[t]he decree was properly supported when the district court entered the injunction in 1984.'" *Balark*, 81 F.3d at 661, Pet. App. 5a. Judge Easterbrook, of course, was a member of the *Balark* panel. He did not dissent from the above-quoted passage or from any portion of the opinion of the court below.[3]

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3. Petitioner makes the waters murky by convoluted quotations. It quotes from Judge Easterbrook's dissent in the vacated opinion without citing the subsequent history of the case, and it does so as to make it appear that the quoted segment comes from *Evans III*:

> As Judge Easterbrook put it in his dissent from the panel opinion in *Evans III*, "[t]he decree was founded on a blunder committed by this court." 995 F.2d at 1404. See 10 F.3d at 476-77 ("[t]his decree is 'based' on *Evans I*") (plurality opinion).

Pet. 14.

Judge Easterbrook, writing for the plurality in *Evans III*, does *not* refer to the decree as being "founded on a blunder . . . " On the contrary, the plurality says it is based on *Evans I*, and as such, it was properly supported when entered.

B. There is No Conflict Among the Circuits

Petitioner treats the consent decree as if it were some kind of interlocutory order, so that it can then argue that the decision of the court below conflicts with decisions of other circuits. A consent decree, however, is not interlocutory in nature. It is a final judgment. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367. 112 S.Ct. 748 (1992).[4] No appeal was taken from entry of the consent decree.

The court below correctly distinguished Rule 60(b) final judgments embodying injunctive relief and consent decrees from judgments reversed during the process of direct appeal. The fact that a consent decree may eventually be vacated under Rule 60(b) does not mean it was not valid while it existed. *Balark*, 81 F.3d at 663, Pet. App. 8a.

The cases cited by petitioner as conflicting with the instant case involve either interlocutory orders, or cases that were reversed on direct appeal as in *Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982) (cited with approval in *Palmer*). They are, thus, distinguishable on their facts and on the law.

In *Doe v. Busbee*, the State of Georgia appealed the district court's granting of summary judgment and injunctive relief. While the appeal was pending, the Supreme Court decided *Harris v. McRae*, 448 U.S. 297 (1980) and *Williams v. Zbaraz*, 448 U.S. 358 (1980) "which substantially undercut the rationale of the district court in entering judgment for plaintiffs." *Doe v. Busbee*, 684 F.2d at 1378. The change in law occurred while the case was still on direct appeal.

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4. We note that petitioner makes no reference in its Petition to *Rufo*, although that recent case is this Court's most definitive statement on the subject of consent decrees and municipalities.

Petitioner cites five additional cases which are similarly distinguishable. In *Smith v. University of North Carolina*, 632 F.2d 316, 322 (4th Cir. 1980), a preliminary injunction was entered pending trial. The plaintiff lost at trial. On direct appeal, the Fourth Circuit said she could not be deemed a prevailing party because she did not prevail on the merits of at least some of her claims.

It follows that the claimed conflict with *Harrington v. Vandalia-Butler Board of Education*, 585 F.2d 192 (6th Cir. 1978), also involving a direct appeal, does not exist. Nor does a conflict exist with *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986) or *Kansas Health Care Inc., v. Kansas Department of Social and Rehabilitation Services*, 31 F.3d 1052 (10th Cir. 1994) in which preliminary injunctions were reversed or vacated on direct appeal.

In *Stewart v. Donges*, 979 F.2d 179 (10th Cir. 1992), the defendant police officer filed an appeal from denial of his qualified immunity motion. The court denied a stay of the trial pending appeal. After a verdict in plaintiff's favor, the Tenth Circuit decided the appeal, holding that the trial was void, that the court had no jurisdiction to conduct the trial, and that the decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985) demonstrated that an appeal could be taken under these circumstances. After the case was remanded to the District Court, plaintiff accepted defendant's offer of judgment, petitioned for fees, and was awarded fees for time put in on the case, including that in preparation for, and at trial. On appeal from the award of attorney's fees the Tenth Circuit reduced the fee award, refusing to compensate the attorneys for trial preparation and trial time.

Alioto v. Williams, 450 U.S. 1012,1013-14 (1981) (Rehnquist, J., dissenting from denial of certiorari) is distinguishable in that it raises the question of exposure to attorney's fees where a pending appeal was dismissed as moot. Just as in *Palmer* and *Kansas Health Care Inc.*, the

plaintiffs in that case did not have a legal right to the preliminary injunction. *Id.* at 1322.

This is in contrast to *Balark* respondents, who had a legal right to the injunction they received. The consent decree was vacated because the majority of the *en banc* Seventh Circuit Court of Appeals deemed it no longer equitable that the decree have *prospective* application.

C. The Court Below Correctly Decided the Issues

The court below correctly applied Supreme Court precedent in deciding that plaintiffs are prevailing parties.

In *Farrar v. Hobby*, 506 U.S.103, 113 S.Ct. 566, 573 (1992), this Court synthesized past precedent applicable to the issue of determining prevailing party status as follows:

> Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought . . . or comparable relief through a consent decree or settlement . . . Whatever relief that plaintiff secures *must directly benefit him at the time of the judgment* or settlement . . . . Otherwise the judgment or settlement canot be said to 'affec[t] the behavior of the defendant toward the plaintiff.'. . . Only under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party . . . In short, a plaintiff of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

(Citations omitted) (Emphasis added).

Respondents obtained actual relief on the merits of their claim, which directly benefitted them at the time the consent

decree was entered, and continues to benefit them to this day. "[P]laintiffs worked for and won a consent decree that remained in force for a decade." *Balark*, 81 F.3d at 665, Pet. App. 12a. This is unlike the plaintiff in *Hewitt v. Helms*, 482 U.S. 755, 764 (1987), who received only a favorable judicial statement during the course of his litigation, but no judgment, consent decree, injunction, or other benefit.

This lawsuit and its consent decree undisputably affected the behavior of the City toward the respondents, affording respondents significant relief, *see Rhodes v. Stewart*, 488 U.S. 1, 4, and materially altered the relationship of the parties.

Respondents prevailed on the most significant claim in the case: reform of the City's policy on budgeting for, and promptly paying, tort judgments. Plaintiffs achieved this relief through a consent decree. *See Maher v. Gagne*, 448 U.S. 122, 129 (1980) (fees may be assessed after entry of a consent decree without a determination that plaintiff's constitutional rights had been violated).

The court below noted that petitioner conceded that the district court "may well have granted fees" under *Maher v. Gagne* "had plaintiffs chosen to petition for fees after entry of the consent decree." *Balark*, 81 F.3d at 665, Pet. App. 13a.

Balark respondents did indeed petition for fees after entry of the consent decree, as well as after the favorable Court of Appeals decision in *Evans I*. Petitioner opposed the interim fee petitions and succeeded in convincing the district court to stay ruling on the issue. Unlike petitioner, who could have appealed from entry of the consent decree, but did not, respondents could not appeal from the district court's orders staying the fee petitions because rulings on interim attorney's fees requests are not appealable.

Seeking to ensnare respondents in this Catch 22 situation, and reap a windfall for itself, the City rests its case on a test

for fees that truly turns on a fortuity. It argues that the determining factor for prevailing party status is the *timing* of the attorney's fees award. If the award had been made while the decree was still in force, petitioner would have no quarrel with it, but because it was not made during that period, respondents are no longer prevailing parties. This wreaks havoc on the entire concept of what it means to be a prevailing party.

This Court has commented that the timing of the benefit to plaintiffs ("at the time of the judgment") is a standard determining "prevailing party" status; it should not be the timing of the attorneys fees request or award. *See Texas State Teachers Assn v. Ga. and Indep. School Dist.*, 489 U.S. 785, 792 (1989). The requirement, that the benefit to plaintiffs be at the time of the judgment, underpins the change in behavior of the defendant toward the plaintiff. The court below correctly summed up the issue:

> "[T]he City concedes in its brief that "had plaintiffs chosen to petition for fees after entry of the consent decree, citing that achievement as a basis for a fee award, the district court may well have granted them fees under *Maher v. Gagne*, [448 U.S. 122 (1980)]." The City's only error is in assuming that the fee petition is different, as a matter of law, because the district court considered it after the decree had been terminated under Rule 60(b)(5). It is not, and plaintiffs are entitled to the fees that relate to their success in obtaining a ten-year consent decree.

Balark, 81 F.3d at 665, Pet. App. 13a.

D. The Issues Are Not Important Enough to Warrant Review and Turn upon the Unique Procedural Posture of this Case

The only persons to be affected by the outcome of this case are the parties to it. Petitioner concedes as much in its petition:

> Thus a ruling in this case that further fees need not be paid after the decree is vacated simply will not bear upon these more typical cases in which fees are awarded before the consent decree is vacated.

Pet. 19, and:

> A ruling in this case will not reach cases in which the decree is set aside because of a subsequent change in the law or because it has been effectuated.

Pet. 19.

Petitioner candidly sets forth the only reason why the case is important to it. It does not want to pay fees to the prevailing party. No party and no public body party wants to pay fees, but the fact is that 42 U.S.C. sec. 1988 impacts upon public bodies.

Petitioner incorrectly represents to this Court that it has "been handed a nearly $1 million bill." Pet. 21. It has been handed no "bill." No decision has been made by the court as to how much in fees petitioner must pay. The court below noted, however, that respondents seek fees only to the time the consent decree was entered on May 31, 1984, and perhaps some limited time afterward. *Balark*, 81 F.3d at 665, Pet. App. 13a.

Although it refers to the fee petitions filed in the district court, petitioner neglects to inform this Court that its position in these filings is that respondents are entitled to less than $300,000 in fees, not "nearly $1 million."

E. Respondents Are Prevailing Parties Entitled to an Award of Attorney's Fees on the Alternative "Catalyst" Theory

Under the consent decree petitioner changed its practice and began paying all tort judgments promptly. Because of the practical result obtained by which petitioner permanently changed its practice, respondents were "catalysts" and are entitled to a fee award, having satisfied both prongs of the two-step test utilized in the Seventh Circuit to qualify as prevailing parties.

The lawsuit acted to provoke voluntary action by petitioner, which was (a) causally related to securing relief and (2) "not wholly gratutious", i.e. the plaintiff['s] claim, if pressed, canot have been frivolous, unreasonable, or groundless." *Stewart v. McGinis*, 5 F.3d 1031, 1039 (7th Cir. 1993). Plaintiffs who "attain the relief they seek through a defendant's voluntary action can be prevailing parties for purposes of the civil rights attorney's fees statute." *Zinn by Blankenship v. Shalala*, 35 F.3d 273 (7th Cir. 1994).

The first prong of the "catalyst" test requires a factual showing of a causal link between the case and the relief provided by the City. This was met by the district court's findings. *See* Pet. App. 15a.

The second prong of the test requires a legal showing that respondents' claim had some legal merit. It was met by the *Evans III* court's findings that the consent decree was properly supported when it was entered. *Evans III* at 480.

F. The Consent Decree Should Not Have Been Vacated by the *Evans III* Court

The unique procedural posture of this case was undoubtedly complicated by the *Evans III* majority reaching back to decide a legal issue (the due process claim) that had been settled in the consent decree. *Evans III* attributed a holding

on this issue to the *Evans II* court, even though the due process issue had not been raised, argued to, or decided by the *Evans II* court.

The *Evans III* majority concluded that, *had* the due process issue been raised in *Evans II*, it would have been decided adversely to respondents. As a consequence of this decision, the *en banc* court ordered that the entire decree be vacated, rather than modified to cure the problem created by the change in law related to the equal protection claim.

All five dissenting judges in *Evans III* were of the opinion that the due process claim was settled in the consent decree. "But by its plain terms the consent decree purported to settle the merits both of the equal protection and of the due process claims." *Evans III*, 10 F.3d at 483 (Cudahy, Cummings & Rovner, JJ., dissenting) .

> This Court repudiated the equal protection theory in Evans II, but the due process theory was left intact. Perhaps the majority is correct in speculating that the Evans II court was in no mood to sustain the due process had it the opportunity to pass on it. However, I think it is a wiser practice to limit what we take from a case to what it in fact says, and not to attribute to cases penumbral holdings about wholly distinct and undecided legal theories.
>
> In my opinion a colorable due process theory supported at least part of this decree when it was entered in 1984, and nothing in Evans II or any other case since alters that conclusion.

Evans III 10 F.3d at 485 (Flaum & Kane, JJ., dissenting).

The *en banc* Court failed to follow the dictates enunciated by this Court in *Rufo*, to tailor the modification of the decree to resolve the problems created by the change in circumstances. "A court should do no more, for a consent decree is a final judgment that may be reopened only to the

extent that equity requires." *Rufo*, 112 S. Ct. at 764.

CONCLUSION

Respondents are prevailing parties for having won a consent decree which was in effect for ten years and which permanently changed the petitioner's practice of paying tort judgments. Petitioner has failed to establish any reason which would merit this Court's consideration of their Petition. The Petition for Certiorari should be denied.

November, 1996

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